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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1952. No. 257.

WASHINGTON LUMBER & MILLWORK CO.,
Petitioner,

v.

DANT & RUSSELL SALES CO.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

OPINION BELOW.

The opinion of the Supreme Court of Pennsylvania is reported at 370 Pa. 627.

STATEMENT OF THE CASE.

This is an action in assumpsit by a wholesale lumber company against a retail lumber dealer for damages resulting from the latter's repudiation of a contract to purchase lumber from plaintiff.

Plaintiff (herein the respondent) is an Oregon corporation, with home offices in Portland, Oregon, and a branch office in Philadelphia, Pennsylvania, and is engaged in the business of selling lumber at wholesale (R 20a). Defendant (herein the petitioner) is a partnership engaged in the retail lumber business in Philadelphia (R 20a). On September 14, 1950, when the prevailing market price of lumber was extremely high (R 51a-52a), plaintiff accepted an order from defendant for the purchase by defendant from

plaintiff of approximately 180,000 feet of No. 3 Common Green Douglas Fir Lumber at $94.00 per thousand feet (R 21a-22a, 103a). At the time of this sale, the lumber was already in transit from the Pacific Coast to Philadelphia aboard the S. S. Cygnet, it having been loaded and shipped on the West Coast by plaintiff about September 1, 1950 (R 21a, 33a-34a, 103a). The sale was termed "F.O.B. dock" meaning that the total contract price of $16,912.01 payable by defendant included cost of transportation by water, backhauling, marine insurance and insurance against fire, theft, pilferage, breakage, non-delivery and oil damage (R 21a-22a, 103a, 105a). In addition, defendant agreed to pay the freight tax on the shipment of $108.02 and to assume the risk of loss in transit (R 22a, 43a, 103a, 105a-106a). On October 10, 1950, the S. S. Cygnet arrived in Philadelphia, and on October 11, 1950, the lumber purchased by defendant was unloaded at the pier of the Ontario Land Company and stacked there for pick-up by defendant (R 31a). The Ontario Land Company immediately notified defendant of the arrival of the lumber and that the lumber was being held there for defendant's account (R 37a-38a). Meanwhile, the prevailing market price of lumber had dropped sharply (R 52a, 66a); and on October 16, 1950, defendant notified plaintiff in writing that it cancelled the sale of September 14, 1950 on the ground that fulfillment of its contractual obligations to plaintiff would constitute a violation of Federal Inventory Control regulations, first issued on September 18, 1950 (R 107a). The Federal regulation referred to by defendant was NPA Regulation 1 issued by the National Production Authority pursuant to section 101 of the Defense Production Act of 1950 (R 11a, 107a). On October 17, 1950, plaintiff notified defendant that it would not accept cancellation of the sale inasmuch as acceptance of the lumber by defendant would not violate NPA Regulation 1 or any other Federal regulation (R 111a-112a). Thereafter, on four separate occasions, defendant

attempted to re-negotiate the price of the lumber, suggesting that if the price were reduced to reflect the decline in the market, it would immediately accept delivery of all the lumber; and on none of these occasions did it claim that its refusal to take the lumber was occasioned by the restrictions on inventory contained in NPA Regulation 1 (R 84a-89a, 91a-92a, 131a). When these efforts proved unsuccessful, defendant sought refuge behind the provisions of NPA Regulation 1 and flatly refused to accept the lumber at the contract price then or at any time in the future (R 25a). Meanwhile, the slump in the lumber market continued (R 52a, 66a), and the price of No. 3 Common Green Douglas Fir Lumber reached a point as low as $65.00 per thousand feet (R 55a-56a). In January of 1951, however, the lumber market showed marked improvement (R 53a, 66a), and on January 4 and January 9, 1951, plaintiff resold all the lumber purchased by defendant for a total price of $12,304.29, this price representing sales of the various parcels at $68.00, $69.50 and $70.00 per thousand feet (R 38a-41a, 44a-45a, 109a, 110a).

On this state of the record, the Lower Court entered judgment for plaintiff in the amount of $5,446.85, being the difference between the original contract price of the lumber and its fair market value on resale plus incidental expenses incurred by plaintiff as a result of the breach. On appeal the judgment of the Lower Court was unanimously affirmed by the Supreme Court of Pennsylvania.

ARGUMENT.

Throughout the course of the extensive litigation in this case, defendant (herein the petitioner) has doggedly, and with signal lack of success, contended that performance of its contract with plaintiff (herein the respondent) was rendered illegal by NPA Regulation 1, and that it was therefore released from its contractual obligations to plaintiff without liability. In its present petition, defendant argues that the action of the Pennsylvania courts in rejecting its alleged reliance on a self-serving interpretation of this Federal regulation is sufficient basis for granting it an opportunity to overturn the unanimous decision of the highest court of that State. In so doing, however, defendant neatly overlooks the following factors, which completely discredited its argument in the eyes of the Pennsylvania courts, and which should lead this court to believe that absolutely no question regarding compliance with or enforcement of NPA Regulation 1 or the Defense Production Act of 1950 is raised by the decision of the Pennsylvania courts.

I. Defendant Failed to Prove That Acceptance of the Lumber Would Have Given It More Than the "Practicable Minimum Working Inventory" Permitted Under NPA Regulation 1.

NPA Regulation 1 prohibits current delivery by a seller to the buyer only if at the time scheduled for delivery the inventory of the buyer would thereby be unduly enlarged over the "practicable minimum working inventory" permitted the buyer under the Regulation. What is meant by "practicable minimum working inventory" is clearly set forth in Section 10.4 of the Regulation. This proof, then, was the most basic ingredient of defendant's case. Yet in the words of the Supreme Court of Pennsylvania (R 137-138):

> "The defendant failed to prove that acceptance of the lumber would have given it more than the 'prac-

ticable minimum working inventory' permitted under the regulation."

Without proof of this fundamental fact, defendant's entire case must of necessity fall at its very outset, its legal arguments become academic, and no basis whatsoever remains for the present petition.

II. Title to the Lumber Passed to Defendant Prior to the Promulgation of NPA Regulation 1 and the Lumber Was Already Part of Defendant's Inventory at the Time When the Restrictions Imposed by that Regulation Became Operative.

The Pennsylvania courts held that title to the lumber passed to defendant prior to the effective date of NPA Regulation 1, with the obvious result that any restrictions on deliveries contained in that Regulation were completely immaterial insofar as the instant transaction was concerned (R 130a, 136). Questions regarding the passage of title in commercial transactions are peculiarly a matter of State law and no citation of authority is needed for the proposition that this court will not disturb the determination of the highest state court in a question of this nature. No question of "subverting" the aims of Federal legislation is involved in such determination. This particular transaction was simply consummated prior to the time when the Federal controls became effective. As a matter of fact, a situation of this type is specifically recognized by the very terms of the Regulation. Thus, a buyer in figuring the practicable minimum working inventory permitted him under the regulation "must include all such material in his possession or held for his account by others" (Section 10.5b). And if the inclusion of the latter gives him more than what would normally be his practicable minimum working inventory, there is no violation of the Regulation because it does not require "disposal of excess inventory which may be on hand" (Section 10.5c). In the instant

case, the lumber in question was clearly held for defendant's account by Ontario Land Company at the time when defendant calculated its practicable minimum working inventory (if, in fact, any such calculation was ever made) (R 37a-38a), and therefore under the express terms of the Regulation should have been included in defendant's inventory.

III. Defendant Could Lawfully Accept Delivery of the Lumber Because It Had Been Loaded, Shipped, Invoiced and Otherwise Consigned by Plaintiff to Defendant Prior to the Receipt by Plaintiff From Defendant of Any Timely Notice to Adjust the Order in Accordance With the Terms of the Regulation.

NPA Regulation, Section 10.9a, provides that "delivery may be made and accepted if the supplier has shipped the material or loaded it for shipment before the receipt of the instruction to adjust". In the instant case, the lumber was loaded, shipped, unloaded and segregated for defendant's account, invoiced and otherwise consigned to defendant prior to receipt by plaintiff from defendant of any timely notice to adjust the order pursuant to the Regulation. As a matter of fact, defendant never made any effort to adjust the order, either timely or otherwise. Accordingly, plaintiff was entitled to make delivery of the lumber, and defendant was correspondingly entitled to receive it without violating either the plain meaning or the spirit of NPA Regulation 1.

IV. Defendant Utilized the Regulation in Bad Faith as a Mere Device for Avoiding the Impact of Potential Losses Resulting From a Falling Lumber Market.

NPA Regulation 1 merely prohibits *current delivery* of lumber by a seller to the buyer if at the time scheduled for *delivery* the inventory of the buyer would be thereby unduly enlarged over the "practicable minimum working inventory" permitted the buyer under the Regulation. The Regu-

lation does not purport to invalidate contracts of sale made prior to its promulgation. Furthermore it "does not confer an absolute right to cancellation of an order in any case, but offers to both parties the alternatives of reduction and deferment thereby enabling the parties to hold to a minimum the interference with existing contracts". Interpretation 1, NPA Regulation 1. Thus, even if defendant's inventory was excessive at the time scheduled for delivery (and there is absolutely no proof that it was), it was obviously not automatically released from its contractual obligations to plaintiff and entitled to repudiate the agreement at will. Rather, it was its duty to arrange for delivery at a subsequent time when it could have accepted the lumber at the contract price without exceeding the practicable minimum working inventory permitted it under the Regulation. The reason why defendant did not do this and instead repudiated the contract was obvious to the Lower Court and to the Supreme Court of Pennsylvania. At the time when defendant originally contracted to purchase the lumber the prevailing market price of lumber was extremely high (R 51a-52a). Shortly thereafter, the prevailing market price of lumber dropped sharply, and remained in a depressed condition for several months (R 52a, 66a). Faced with considerable financial loss, defendant first said nothing about NPA Regulation 1 and suggested to plaintiff that it would willingly accept immediate delivery of all the lumber if the price were renegotiated down to reflect the decline in the market (R 84a-89a, 91a-92a, 131a). When this was refused and the full contract price insisted upon, defendant seized upon the coincident promulgation of NPA Regulation 1 as a happy means of escaping a commitment no longer as attractive as it had originally appeared to be, and at the same time avoiding all liability to plaintiff. As the Supreme Court of Pennsylvania so accurately summarized (R 137):

> "But the defendant did not avail himself of the method of prompt cancellation, reduction or deferment

in accordance with the regulation, all of which substantiates the plaintiff's argument that the defendant sought utilization of the Regulation only as a device to avoid potential losses resulting from a falling market."

and as the Lower Court so aptly stated (R 129a-130a):

"It would seem, therefore, that while the intention of the regulation was to prohibit delivery at a time when the buyer's inventory was excessive, it was at the same time intended to prevent it being used as a device to avoid business deals which had become unprofitable to the buyer at the time delivery was scheduled.

"The courts should prevent such a misuse of the regulation, if possible, as otherwise the door might be opened to permit many unwarranted actions by purchasers to put through their own interpretation of the Federal regulations seeking to avoid business deals which appeared good at the date of the contract, but not so good at the time of delivery because of price fluctuations."

In view of this background, it is submitted that no Federal question of substance is present in this case and that no injustice could conceivably be done to this defendant by denying its Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

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